

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

DANIEL P. SHANNON.

2:11-CV-1174 JCM (RJJ)

Plaintiff,

V.

BANK OF AMERICA N.A., et al.,

Defendants.

ORDER

16 Presently before the court is defendant Quality Loan Service Corporation's motion to dismiss
17 for failure to state a claim upon which relief can be granted. (Doc. #6). Defendant Bank of America,
18 N.A. has joined in the motion (doc. #9), as has defendant Meridas Capital, Inc. (doc. #14). Plaintiff
19 Daniel Shannon, appearing in proper person, has filed an opposition (doc. #12), and Quality Loan
20 has replied (doc. #13).

21 “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted
22 as true, to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937,
23 1949 (2009) (internal quotation marks omitted). Dismissal is proper when the complaint does not
24 make out a cognizable legal theory or does not allege sufficient facts to support a cognizable legal
25 theory. *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). A complaint
26 that alleges only “labels and conclusions” or a “formulaic recitation of the elements of the cause of
27 action” will not survive dismissal. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

1 **Counts 1, 8, and 9: Fraud Claims¹**

2 Plaintiff's first, eighth, and ninth causes of action allege various forms of fraud. Pursuant
 3 to Federal Rule of Civil Procedure 9, claims of fraud must be plead with specificity. The elements
 4 of fraud include: (1) a material representation or deceit that is false; (2) knowledge of falsity; (3)
 5 intent to defraud; (4) justifiable reliance; and (5) resulting damages. *Stearns' Properties v. Trans-*
 6 *World Holdings Corp.*, 492 F. Supp. 238, 241-42 (D. Nev. 1980). Allegations of fraud must be
 7 accompanied by "the who, what, when, where, and how of the misconduct charged." *Vess v.*
 8 *Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003).

9 Plaintiff's fraud allegations fall far short of the requirements of Rule 9. Plaintiff fails to
 10 allege facts with sufficient particularity and specificity to meet the heightened pleading standard for
 11 fraud causes of action. Rather, the allegations amount to the type of "formulaic recitations" that the
 12 Supreme Court disapproved of in *Twombly*. See *Twombly*, 550 U.S. at 555. Because these
 13 allegations fail to inform as to "the who, what, when, where, and how" of the alleged fraudulent
 14 scheme, the claim must fail. See *Vess*, 317 F.3d at 1106.

15 **Count 2: Breach of the Covenant of Good Faith and Fair Dealing**

16 Plaintiff asserts that defendant Meridias engaged in "bait and switch" tactics, by offering a
 17 5.99% fixed interest rate during loan negotiations, but altering the figure to a 6.375% variable rate
 18 in the final loan documents. Plaintiff contends that such actions constitute a breach of the implied
 19 covenant of good faith and fair dealing inherent in every contract. See *Hilton Hotels Corp. v. Butch*
 20 *Lewis Prod., Inc.*, 107 Nev. 226, 234 (1991).

21 The complaint fails to allege how the remaining defendants were involved in this "bait and
 22 switch" maneuver. This court finds that plaintiff has stated a claim for relief against Meridias for
 23 a breach of the implied covenant of good faith and fair dealing. However, the allegations do not state
 24 a claim as against the remaining defendants.

25
 26
 27 ¹The court notes that plaintiff's complaint contains two counts labeled as "Count 9." The
 28 analysis in this section pertains to the "second" count 9, alleging constructive fraud.

1 **Count 3: Quiet Title**

2 “An action may be brought by any person against another who claims an estate or interest in
 3 real property, adverse to him, for the purpose of determining such adverse claim.” NRS § 40.010.
 4 In a quiet title action, the plaintiff carries the burden to establish that he has good title. *Breliant v.*
 5 *Preferred Equities Corp.*, 112 Nev. 663, 669 (1996) (citing *Ernie v. Trinity Lutheran Church*, 51
 6 Cal.2d 702 (1959)). A quiet title action requires the plaintiff to show that the defendant is unlawfully
 7 asserting an adverse claim to the disputed title. *Kemberling v. Ocwen Loan Servicing, LLC*, 2:09-cv-
 8 00567-RCJ-LRL, 2009 WL 5039495, *2 (D. Nev. Dec. 15, 2009).

9 Here, plaintiff’s complaint fails to allege that defendant is unlawfully asserting an adverse
 10 claim to title. Plaintiff seeks to quiet title based upon the notice of default that was recorded against
 11 the subject property. However, plaintiff’s complaint does not assert that this notice of default was
 12 wrongfully recorded (e.g. nothing in the complaint refutes the premise that plaintiff has defaulted
 13 on his home loan). Accordingly, in his request to quiet title, plaintiff fails to state a claim upon
 14 which relief can be granted.

15 **Count 4: Wrongful Foreclosure**

16 “An action for the tort of wrongful foreclosure will lie if the trustor or mortgagor can
 17 establish that at the time the power of sale was exercised, or the foreclosure occurred, no breach of
 18 condition or failure of performance existed. . . .” *Collins v. Union Fed. Sav. & Loan Ass’n*, 662 P.2d
 19 610, 623 (Nev. 1983). Plaintiff has failed to allege any breach of condition or failure of
 20 performance. Thus, this cause of action must be dismissed.

21 Plaintiff’s allegation regarding wrongful foreclosure is premised on the involvement of
 22 Mortgage Electronic Registration Systems, Inc. (“MERS”) in the foreclosure process. Plaintiff
 23 alleges that by divorcing the deed of trust from the promissory note, the loan was no longer secured
 24 and MERS had no right to institute foreclosure proceedings. This argument has been rejected by the
 25 Ninth Circuit. *See Cervantes v. Countrywide Home Loans, Inc.*, – F.3d –, 2011 WL 3911031, *6-7
 26 (9th Cir. Sept. 7, 2011).

1 Accordingly, plaintiff has failed to state a claim for wrongful foreclosure (count 4) and
 2 therefore has also failed to state a claim to have the trustee's deed upon sale declared void (count
 3 11). Both counts are dismissed.

4 **Count 9: Negligent Misrepresentation**²

5 Plaintiff's cause of action alleging fraudulent misrepresentation is time barred. Pursuant to
 6 NRS 11.190(d), the applicable limitations period is three years. The loan at issue here was
 7 originated May, 2007. The suit, however, was filed June 10, 2011. Accordingly, over three years
 8 elapsed between the facts giving rise to the alleged injury and the commencement of the suit.
 9 Plaintiff has failed to argue why the limitations period should not apply to the facts of his case. *See*
 10 *Bank of Nevada v. Friedman*, 82 Nev. 417, 422 (1966).

11 **Count 12: Unfair Lending Practices**

12 Plaintiff's cause of action alleging unfair lending practices is similarly time barred. Claims
 13 under Nevada's predatory lending statute, NRS 598D, must be brought within two years. *See*
 14 NRS 11.190(4)(b). As previously explained, plaintiff brought his suit over four years after signing
 15 the loan documents. Plaintiff has failed to argue why the limitations period should not apply to the
 16 facts of his case. *See Bank of Nevada v. Friedman*, 82 Nev. 417, 422 (1966).

17 Accordingly,

18 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that defendant Quality Loan's
 19 motion to dismiss (doc. #6) be, and the same hereby is, GRANTED.

20 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that plaintiff's first, third,
 21 fourth, eighth, ninth, ninth, eleventh, and twelfth causes of action be dismissed. The second cause
 22 of action shall be dismissed only as to Bank of America and Quality Loan.

23 DATED September 29, 2011.

24
 25 
 26 **UNITED STATES DISTRICT JUDGE**

27 ²As explained in note 1, plaintiff's complaint contains two counts labeled as "Count 9." The
 28 analysis in this section pertains to the "first" count 9, alleging negligent misrepresentation.